No. 86-328

In The
Supreme Court of the United States
October Term, 1986

CHAMPION INTERNATIONAL CORPORATION,
Petitioner,

vs.

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO, AND ITS LOCAL 5-376,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether in non-diversity cases federal courts may tax as costs the fees of expert witnesses in excess of the amount set forth in 28 U.S.C. § 1821.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are Champion International Corporation, the International Woodworkers of America, AFL-CIO, and its Local 5-376.*

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*There are no parent companies, subsidiaries or affiliates of Champion International Corporation required for listing by Rule 28.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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OPINIONS BELOW

The opinion of the court of appeals on rehearing (Petition Appendix A) is reported at 790 F.2d 1174 (5th Cir. 1986 (en banc). The panel opinion of the court of appeals (Petition Appendix B) is reported at 752 F.2d 163 (5th Cir. 1985) (per curiam). The unreported opinion of the district court is reproduced in Petition Appendix C. The unreported decision of the district court's magistrate is reproduced in Petition Appendix D.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1986. The petition for a writ of certiorari was docketed in this Court on August 29, 1986. The petition was granted on December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1821(b) provides:

> A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fees for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

Rule 54(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

STATEMENT OF THE CASE

The International Woodworkers of America, AFL-CIO, and its Local 5-376 ("IWA") sued Champion International Corporation ("Champion") alleging violations of Title VII of the Civil Rights Act of 1964, *as amend-*

ed, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Three Champion employees subsequently were allowed to intervene as plaintiffs and ultimately were certified as representatives of a class.

After a trial, which centered upon testimony offered by an expert witness hired by Champion, the district court rejected the claims of the IWA, all other plaintiffs and the class. *Woodworkers v. Champion International Corp.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,287 (N.D. Miss. 1982), *aff'd*, 732 F.2d 939 (5th Cir. 1984) (per curiam). A judgment was entered the same day assessing all costs against the IWA.

Champion thereafter filed a bill of costs, which included a request for expert witness fees, and a motion for allowance of the company's attorneys' fees as a part of the costs of the case. The district court denied Champion's motion for attorneys' fees. All other costs questions, including the request for the expert witness fees, were referred to a magistrate.

In light of substantial local district authority approving the practice in some circumstances, the magistrate taxed the IWA with a portion of Champion's expert witness fees. The IWA appealed the magistrate's decision to the district judge.

The district judge reversed the magistrate's holding and, instead, followed what he believed to be the "normal civil litigation rule [that] disallows excess fees for expert witnesses." More specifically, the district judge construed existing Fifth Circuit decisions as precluding the taxing of expert witness costs to the prevailing party, except in cases where the losing litigant had proceeded

in bad faith or where the prevailing party is a civil rights plaintiff. The local district authority relied upon by the magistrate to support his decision was expressly overruled. Champion appealed the decision.

A panel of the court of appeals affirmed the district judge's decision that prevailing defendants in non-frivolous civil rights actions may recover expert witness costs only under standards established by this Court's civil rights attorneys' fees decisions. The panel further held that an indispensable-to-the-case standard for taxing expert witness costs found in some Fifth Circuit decisions should not be extended to civil rights cases.

On rehearing en banc, the court of appeals rejected the theories of the magistrate, the district judge and the panel. The majority held that, absent bad faith or a statute expressly authorizing such an award, no federal non-diversity litigant may recover expert witness costs in excess of the amount provided for in 28 U.S.C. § 1821. Rule 54(d) of the Federal Rules of Civil Procedure was construed as providing discretion only to disallow expenses otherwise expressly provided by statute rather than as a procedural acknowledgement of district courts' inherent equitable power to allow expenses. The court of appeals expressly overruled its prior opinions purporting to recognize exceptions for prevailing civil rights plaintiffs and in those instances where the expert witness was indispensable to a proper determination of the case.

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SUMMARY OF ARGUMENT

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, nonstatutory costs such as expert witness fees could be taxed as costs in equity cases. Rule 54(d) incorporated the practice in equity and, thus, the term "costs," as used in Rule 54(d), may include, in the sound equitable discretion of the district court, expert witness fees.

District court discretion to tax expert witness costs pursuant to Rule 54(d) should be triggered by the trial court's conclusion that the expert witness was necessary to a proper determination of the case. The American Rule does not prohibit such considerations and a fair reading of *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), compels the conclusion that a functional analysis, rather than the court of appeals' wooden approach, is appropriate for nonstatutory costs issues.

A litigant's status as a Title VII defendant does not automatically disqualify it from the district court's Rule 54(d) discretion to tax expert witness fees as costs. The same equitable discretion which permits such awards clearly permits district courts to decline an otherwise appropriate award on the basis of the losing party's inability to pay. Moreover, Rule 54(d) should be interpreted uniformly both between parties and among the various causes of action heard by federal courts if the inconsistent and contradictory state of the law which currently exists with respect to expert witness costs is to be avoided in the future.

ARGUMENT

I.

RULE 54(d) INCORPORATES THE LONG-STANDING RULE IN EQUITY THAT FEDERAL COURTS POSSESS INHERENT AUTHORITY TO TAX NONSTATUTORY EXPENSES AS COSTS.

In defining the term "costs," this Court has uniformly relied upon "the contemporaneous understanding of the term." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 759 (1980). Rule 54(d), therefore, should be construed to have incorporated the common understanding of costs at the time of the adoption of the Federal Rules of Civil Procedure in 1938. *See generally* 4 C. Wright & A. Miller, *Federal Practice & Procedure* § 1004 (1969).

There is no question, at least in equity cases, that nonstatutory litigation expenses were considered potential taxable costs prior to the adoption of the federal rules. This Court recognized long ago that "[t]he allowance of costs in the federal courts rests, not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes." *Ex parte Peterson*, 253 U.S. 300, 315 (1920). "Plainly the foundation for the historic practice of granting reimbursement for the cost of litigation other than [statutory] costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939).

The contemporaneous understanding of Rule 54(d)'s reference to "costs" thus contemplated the taxing of nonstatutory costs at least in some circumstances in equity

cases. Moreover, as noted in Judge Rubin's opinion below, substantial authority exists for the proposition that Rule 54(d) specifically incorporated the costs practices of equity. *Petition Appendix* at A-29, *citing Harris v. Twentieth Century-Fox Film Corp.*, 139 F.2d 571, 571 n.1 (2d Cir. 1943); 10 C. Wright, A. Miller & M. Kane, *Federal Practice & Procedure* § 2665, at 171 (2d ed. 1983).

The adoption of the Federal Rules of Civil Procedure and Rule 54(d)'s incorporation of the costs practices in equity more than adequately explain the differences between *Henkel v. Chicago, St. P., M. & O. Rwy.*, 284 U.S. 444 (1932), and *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), which, at first blush, appear to embody irreconcilable views of nonstatutory costs. *Henkel*, decided before adoption of the federal rules, properly found that expert witness fees were not taxable "in a law case." 284 U.S. at 445. *Farmer*, decided after adoption of the federal rules and the merger of law and equity, correctly focused on the limits of "the discretion given district judges to tax costs . . . not specifically allowed by statute" afforded by Rule 54(d). 379 U.S. at 235.

The court of appeals construed the "except where express provision therefor is made either in a statute of the United States or in these rules" language of Rule 54(d) to be a limitation upon the power of federal courts to tax costs beyond those specifically enumerated by statute. As Judge Rubin's opinion below noted, such a construction is foreclosed by the expressed "permissive" intent of the framers of the rules. *Petition Appendix* at A-27, *citing 1948 United States Code Congressional Service* 1887-88 (80th Cong., 2d Sess.). The fact of the matter is that the term "costs" is not defined anywhere by the federal rules

and, therefore, "varying definitions of 'costs,'" *Marek v. Chesny*, 105 S. Ct. 3012, 3017 (1985), may be applied to Rule 54(d). Only the most contorted reading of Rule 54 (d) escapes the plain meaning of the proviso: district courts possess discretion to award costs except where Congress has expressly prohibited such an award. *See, e.g., Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (statutory prohibition of costs award against veterans in reemployment suits).

Accordingly, Champion submits that it is beyond reasonable dispute that at least some discretion to tax nonstatutory costs such as expert witness fees exists under Rule 54(d). The more important debate concerns the circumstances under which trial courts may properly exercise their Rule 54(d) discretion.

II.

NONSTATUTORY COSTS SUCH AS EXPERT WITNESS FEES ARE TAXABLE WHERE THE TRIAL COURT FINDS THAT THE COSTS WERE NECESSARILY INCURRED FOR THE COURT'S PROPER DETERMINATION OF THE CASE.

Champion submits that trial courts possess the inherent equitable discretion to award nonstatutory costs such as expert witness fees to the prevailing party in cases where the court finds that the costs were necessarily incurred for the court's proper determination of the case. *See, e.g., Shakey's, Inc. v. Covalt*, 704 F.2d 426, 437 (9th Cir. 1983) ("essential to establish the defense"); *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 339 (8th Cir. 1982) ("'crucial or indispensable'") (citation omitted), *rev'd on other grounds*, 727 F.2d 692 (8th Cir.) (en banc), *cert.*

denied, 105 S. Ct. 222 (1984); *Roberts v. S. S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3d Cir. 1981) ("indispensable to determination of the case"). "The inherent powers of federal courts are those which 'are necessary to the exercise of all others.' " *Roadway Express, Inc. v. Piper*, 447 U.S. at 764 (citation omitted). When a district judge determines that the case could not have been properly decided without the expert testimony, the court should be permitted to exercise its sound equitable discretion to apportion the costs of presenting such testimony.

The touchstone is the benefit to the court. In virtually every decision holding that district courts possess discretion to tax expert witness costs, the reason cited is the critical importance *to the court* of the expert witness' testimony. *See, e.g., Welsch v. Likins*, 68 F.R.D. 589, 597 (D. Minn.) ("expert witnesses were an indispensable part of this trial [enabling] the court to fashion not only necessary but practical requirements. . . ."), *aff'd*, 525 F.2d 987 (8th Cir. 1975) (per curiam).

Therein lies the distinction, in Champion's view, between attorneys' fees decisions, such as *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), and the instant case. Attorneys' fees clearly fall within the American Rule's general prohibition of taxing traditional client-solicitor costs. *Id.* at 255-59. Expert witness costs, while ultimately benefiting the prevailing party, in some cases assume an added dimension, separate and apart from partisan advantage, which uniquely benefits the trial court. In this limited circumstance, Champion submits that the sound discretion of the district judge must be respected.

The distinction also underscores the court of appeals' mistaken disregard of *Farmer*. The *Farmer* opinion need

not be stood "on its head," as the court of appeals argued, to appreciate the choice of words utilized by this Court to decline the invitation in that case categorically to forbid the taxing of all nonstatutory witness costs. "We cannot accept . . . Farmer's argument that a federal district court can never under any circumstances tax as costs [nonstatutory witness] expenses. . . . " *Farmer v. Arabian American Oil Co.*, 379 U.S. at 232. The *Farmer* opinion clearly disavows the wooden approach taken by the court of appeals in the instant case and, instead, recommends a functional scrutiny of nonstatutory costs, a functional analysis which Champion submits should focus upon the importance of the testimony to the trial court's proper determination of the case.

III.

EXPERT WITNESS COSTS ARE TAXABLE FOR AND AGAINST ALL FEDERAL LITIGANTS.

As noted earlier, Rule 54(d) does not define the term "costs." Consequently, no distinction whatsoever is made between plaintiffs and defendants or among particular causes of action. While there is no question that Congress intended to encourage the filing of certain types of lawsuits, such as Title VII actions, and that Congress has expressed concern in a number of contexts for the plight of the impecunious plaintiff in an increasingly expensive federal judicial system, such concerns do not warrant the complete and automatic exclusion of Title VII defendants from the expert witness costs discretion found in Rule 54(d). Unless otherwise specifically provided by statute, Champion submits that expert witness costs are taxable for and against all federal litigants.

If Congress had intended to except Title VII plaintiffs from all potential costs responsibilities it would have done so but, from the plain language of the statute, Congress clearly made no such effort. Furthermore, for at least two reasons, district court discretion under Rule 54(d) does not present any practical threat to the filing of Title VII suits by impecunious plaintiffs.

First, the standard for taxing expert witness costs presents a formidable threshold obstacle to an award for any party. No one advocates nonstatutory awards of expert witness fees in routine cases where the trial court's proper resolution of the case did not rest upon the expert's testimony. Trial courts are perhaps more cognizant than anyone of the fact that, although frequently interesting, expert testimony is not always an indispensable part of the case. *See, e.g., Smith v. American Service Co.*, 38 Fair Empl. Prac. Cas. 377, 381 (N.D. Ga. 1985) (denying expert witness costs to a prevailing employment discrimination plaintiff). There are no floodgates to be opened.

Second, all costs of litigation, including statutory costs which are presumptively taxable, *e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981), are subject to denial by the trial court for any number of compelling equitable reasons, including inability to pay. *E.g., Badillo v. Central Steel & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983). The same considerations should apply with equal force to nonstatutory costs such as expert witness fees. Moreover, not all Title VII plaintiffs are impecunious plaintiffs. Large and powerful labor organizations such as the IWA possess substantial economic resources and the nation's most prolific Title VII plaintiff, the U.S. Equal Employment Oppor-

tunity Commission, hardly can be equated with an out-of-work individual.

This Court's decision in *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412 (1978), does not require a different result. In addition to the fact that attorneys' fees awards traditionally are evaluated under entirely different standards than Rule 54(d) costs, *e.g.*, *Baez v. Department of Justice*, 684 F.2d 999, 1003 (D.C. Cir. 1982) (en banc), the *Christiansburg* standard rests upon the specific congressional intent behind a particular statute, section 706(a) of Title VII, 42 U.S.C. § 2000e-5(k). As argued previously, if district courts have authority to award expert witness costs at all, that authority is derived from Rule 54(d)'s incorporation of the federal judiciary's inherent equitable powers. Unlike section 706(k), Rule 54(d) applies to all causes of action and, unless the goal is utter chaos, Rule 54(d) should be interpreted uniformly both between parties and among the various causes of action heard by federal courts.

CONCLUSION

Champion is entitled to present its arguments to the district court in favor of taxing the expert witness fees incurred in this case. Rule 54(d) clearly provides the necessary discretion for the district court to make such an award to Champion and to any other federal litigant. For these reasons, the judgment of the court of appeals must be reversed.

Respectfully submitted,

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